United States of America

IN THE

Supreme Court of the United States

No. 1266 73

ANNA M. BOUTELL and CARROLL M. BOUTELL,
doing business as F. J. Boutell Service Company,
Petitioners and Appellants Below,
vs.
L. METCALFE WALLING, Administrator of the
Wage and Hour Division, United States
Department of Labor,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent and Appellee Below

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Supreme Court of the United States:

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit in equity brought in the District Court of the United States for the Eastern District of Michigan, Southern Division, by L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Depart-

ment of Labor, respondent herein, against Anna M. Boutell and Carroll M. Boutell, doing business as F. J. Boutell Service Company, petitioners herein, for a judgment enjoining and restraining petitioners herein, their agents, servants, employees, and attorneys, and all persons acting or claiming to act in their behalf and interest, from violating the maximum hour and minimum wage provisions of the Fair Labor Standards Act, so-called. Respondent herein filed a Motion for Summary Judgment based on the pleadings on file in the case and a judgment was rendered thereon in favor of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, against Anna M. Boutell and Carroll M. Boutell, doing business as F. J. Boutell Service Company, as prayed.

An appeal from said judgment was taken by Anna M. Boutell and Carroll M. Boutell, doing business as F. J. Boutell Service Company, petitioners herein, to the United States Circuit Court of Appeals for the Sixth Circuit, which affirmed the judgment of the District Court of the United States for the Eastern District of Michigan, Southern Division. The only questions involved on said appeal were:

(1) Whether employees of the F. J. Boutell Service Company who are employed exclusively in the State of Ohio to service, repair and maintain motor transportation equipment owned and operated by a Motor Carrier are employed in a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce"; and

(2) Whether the employees of the F. J. Boutell Service Company, who are employed exclusively to repair and maintain the motor transportation equipment of a Motor Carrier, engaged in interstate commerce, and who are

necessarily, because of the type of their work, engaged in work affecting "safety of operation of the motor vehicles," are subject to the jurisdiction of the Interstate Commerce Commission;

which questions were decided by said United States Circuit Court of Appeals for the Sixth Circuit and materially affected the determination of said appeal.

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals for the Sixth Circuit in holding that the employees of the F. J. Boutell Service Company who service, repair and maintain motor transportation equipment owned and operated by a motor carrier are not employed in a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" involves an important question of federal law which has not been, but should be, settled by this court.

2. The decision of the Circuit Court of Appeals in holding that the employees of the F. J. Boutell Service Company who are employed exclusively to repair and maintain the motor transportation equipment of a Motor Carrier engaged in interstate commerce and who are necessarily, because of the type of their work engaged in work affecting "safety of operation of the motor vehicles," are not subject to the jurisdiction of the Interstate Commerce Commission, involves an important question of federal law which has not been, but should be, settled by this Court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the

United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket, No. 9792, Anna M. Boutell and Carroll M. Boutell, doing business as F. J. Boutell Service Company, appellants, v. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Sixth Circuit be reversed by the Court; and for such further relief as to this Court may seem proper.

HARRY G. GAULT,
Attorney for Appellants, Anna M. Boutell and Carroll M. Boutell, doing business as F. J. Boutell Service Company.

CARTON, GAULT & DAVISON,
Attorneys of Counsel for Appellants.

GLENN M. COULTER and
JACK NEWCOMBE,
Attorneys of Counsel for Appellants.

May 1945.

United States of America

IN THE

Supreme Court of the United States

No.....

ANNA M. BOUTELL and CARROLL M. BOUTELL,
doing business as F. J. Boutell Service Company,
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vs.
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Respondent and Appellee Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Your petitioners respectfully show:

I.

OPINIONS OF COURTS BELOW

The Findings of Fact and Conclusions of Law together with the Judgment of the District Court of the United States for the Eastern District of Michigan, Southern Division, are not reported but are set forth on pages 18-20 of Petitioners' and Appellants' Record, and the Judgment is dated January 10, 1944.

The opinion and judgment of the United States Circuit Court of Appeals for the Sixth Circuit bears date of February 14, 1945, and is set forth on pages 37-38 of Petitioners' and Appellants' Record.

II.

JURISDICTION

1. The date of the judgment being reviewed is February 14, 1945.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is c. 517, Sec. 6, 26 Stat. 828 as amended (28 U.S.C.A., Sec. 347, Judicial Code, Sec. 240, amended):

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.
>
> "(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of

error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

"(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section. (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)"

3. Facts, nature of the case and ruling of the courts below bringing the case within the jurisdiction provision above quoted has already been stated in the preceding petition under I (page 1) which is hereby adopted and made a part of this brief.

III.

STATEMENT OF THE CASE

This has already been stated in the preceding petition under I (page 1), which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that employees of the F. J. Boutell Service Company who are employed exclusively in the State of Ohio to service, repair and maintain motor transportation equipment owned and operated by a Motor Carrier are not employed in a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that qualifications and maximum hours of service of employees of the F. J. Boutell Service Company who are employed exclusively to repair and maintain motor transportation equipment of a Motor Carrier engaged in interstate commerce, and who are necessarily, because of the type of their work, engaged in work affecting "safety of operation of the motor vehicles," are not subject to the jurisdiction of the Interstate Commerce Commission under the provisions of the Motor Carrier Act of 1935.

V.

ARGUMENT

STATEMENT OF FACTS AND SUMMARY OF THE ARGUMENT

The appellants are members and part owners of a partnership which does business under the name and designation of the F. J. Boutell Service Company. Wilbur H. and Marvin E. Boutell are the remaining members of said partnership, but are not named as parties to the within cause for the reason that they are not within the jurisdiction of this Court.

The appellants in their partnership operation maintain a place of business at 210 Alexis Road in the City of Toledo, Ohio, where they are engaged in the repair and maintenance of motor transportation equipment. The motor transportation equipment, consisting of trucks, trailers and tractors, upon which the employees of the F. J. Boutell Service Company exclusively work, is owned and operated by the F. J. Boutell Drive-Away Company. The F. J. Boutell Drive-Away Company is a Michigan corporation and is an entity separate and distinct from

the F. J. Boutell Service Company. However, the four above-mentioned partners of the F. J. Boutell Service Company are the sole stockholders of the F. J. Boutell Drive-Away Company.

The F. J. Boutell Drive-Away Company has for more than a year prior hereto been engaged in the transportation of Army Ordnance materiel in interstate commerce, and prior to that time had been engaged in the transportation of new automobiles to distributors.

The Appellants' employees involved in this proceeding are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, and since the effective date of the Motor Carrier Act have been employed in accordance with the terms and provisions of said Act.

Point A

THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE EMPLOYEES OF THE F. J. BOUTELL SERVICE COMPANY WHO ARE EMPLOYED EXCLUSIVELY IN THE STATE OF OHIO TO SERVICE, REPAIR AND MAINTAIN MOTOR TRANSPORTATION EQUIPMENT OWNED AND OPERATED BY A MOTOR CARRIER, ARE NOT EMPLOYED IN A "RETAIL OR SERVICE ESTABLISHMENT THE GREATER PART OF WHOSE SELLING OR SERVICING IS IN INTRASTATE COMMERCE."

POINT B

THE COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE QUALIFICATIONS AND MAXIMUM HOURS OF SERVICE OF EMPLOYEES OF THE F. J. BOUTELL SERVICE COMPANY WHO ARE EMPLOYED EXCLUSIVELY TO REPAIR AND MAINTAIN THE MOTOR TRANSPORTATION EQUIPMENT OF A MOTOR CARRIER ENGAGED IN INTERSTATE COMMERCE AND WHO ARE NECESSARILY, BECAUSE OF THE TYPE OF THEIR WORK, ENGAGED IN WORK AFFECTING "SAFETY OF OPERATION OF THE MOTOR VEHICLES," ARE NOT SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION UNDER THE PROVISIONS OF THE MOTOR CARRIER ACT OF 1935.

POINT A

THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE EMPLOYEES OF THE F. J. BOUTELL SERVICE COMPANY WHO ARE EMPLOYED EXCLUSIVELY IN THE STATE OF OHIO TO SERVICE, REPAIR AND MAINTAIN MOTOR TRANSPORTATION EQUIPMENT OWNED AND OPERATED BY A MOTOR CARRIER, ARE NOT EMPLOYED IN A "RETAIL OR SERVICE ESTABLISHMENT THE GREATER PART OF WHOSE SELLING OR SERVICING IS IN INTERSTATE COMMERCE"

The exemption provided in Section 13 (a) (2) of the Fair Labor Standards Act of 1938 removes from the benefits of overtime compensation as provided by Section 7 of the Fair Labor Standards Act of 1938, "Any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." Therefore, the employees of a retail dealer or service establishment the greater part of whose selling or servicing is in intrastate commerce is exempt from the

minimum wage and maximum hour provisions of the Fair Labor Standards Act. See *Super-Cold Southwest Co. v. McBride*, 124 Fed. (2d) 90. The question of whether a retail sale exists is not altered by the character of the sale or the use to which the consumer may put the purchased commodity. It is immaterial that the products sold were used subsequently for commercial purposes. See *Super-Cold Southwest Co. v. McBride, supra; White Motor Company v. Littleton*, 124 Federal (2d) 93.

It is immaterial whether the service is performed for a private or commercial use. See *Super-Cold Southwest Co. v. McBride, supra.* Also, it is immaterial if the service or retail establishment knows definitely that the product is ultimately to travel in interstate commerce. See *Rogers v. Glazer*, 32 Fed. Supp. 990, District Court, W. D. Missouri, April 16, 1940, Justice Roberts in a dissent to the majority opinion in *Warren-Bradshaw Drilling Co. v. Hull*, 317 U. S. 88, said:

> "I think Congress could not and did not intend to assert its granted power over interstate commerce upon what in practice and common understanding is purely local activity, on the pretext that everything anybody does is a contributing cause to the existence of commerce between the States, and in that sense necessary to its existence."

Justice Roberts' dissent was later followed in *Rogers v. Glazer, supra.*

The case of *L. Metcalfe Walling, Acting Administrator of the Wage and Hour Division, United States Department of Labor, v. John J. Casale, Inc.*, U. S. District Court, Southern Division of N. Y., Civil No. 17-7, March 26, 1943, presents the identical issue as presented in the principal case, however, the facts in the two cases being distinguishable. In the above-mentioned case the defend-

ant is the owner of a fleet of trucks and rents them to various trucking companies who are engaged in interstate transportation. Defendants' trucks are leased to some sixty-odd customers, consisting of wholesalers, jobbers, and distributors of manufactured goods. Incidental thereto the lessor maintains 22 garages for the servicing, housing and maintaining of his trucks, the garages being located in three different states. The work performed on the trucks is done by the defendants' employees and the work consists of greasing, refueling and repairing the vehicles and keeping them in proper order for use by the lessees. One of the numerous defenses raised by the defendant therein was that the defendants' employees engaged in the maintenance of the transportation equipment were employees of a service establishment the greater part of whose servicing was in intrastate commerce. Based on this defense, the defendant filed a motion to dismiss the plaintiff's bill of complaint. The Court denied the defendant's motion on the ground that, "As a result of the expenditure of large capital funds, defendant not only services, but has become the owner of, a huge fleet of vehicles that are leased to corporations and concerns, which in the aggregate engaged in a substantial amount of business in interstate commerce." Also, the Court on its own volition remarked that "if all the trucks here in question were owned and operated separately by the several business houses that use them, and if defendant's activities for a consideration were limited to greasing, repairing and servicing the same, the defense founded on Sec. 13(a)(2) of the Fair Labor Standards Act of 1938 might be strong enough to bring about a dismissal of the Bill." The facts of the case before the Court at the present time are the exact circumstances to which the Court was referring in the *Casale* case, *supra*. The transportation equipment upon which the employees of the

defendant work is owned and operated by the F. J. Boutell Drive-Away Company, a separate and distinct entity from the F. J. Boutell Service Company. The trucks are driven into Ohio by the drivers of the F. J. Boutell Drive-Away Company where they are then greased, repaired and serviced by the employees of the F. J. Boutell Service Company. When the trucks have been serviced, the F. J. Boutell Drive-Away Company employees then again call for the trucks and remove them from the premises of the F. J. Boutell Service Company. In other words, the exact set of facts the Court in the *Casale* case, *supra,* thought might justify a dismissal of the plaintiff's bill of complaint as falling within the exemption as set forth in Section 13(a)(2) of the Fair Labor Standards Act of 1938 are present in the case before the Court at this time.

The case of *Ellinger v. Goodyear Tire & Rubber Company,* U. S. District Court, Northern District of Iowa, Western Division, June 6, 1941, presents an analogous problem to that involved in the principal case. In the *Ellinger* case, *supra,* the defendant was engaged in merchandising tires, inner tubes, and other motor vehicle accessories for trucks and automobiles. Defendant rendered this service to the public generally and in this regard presents a fact not found in the principal case. The Court in the *Ellinger* case, *supra,* found that the defendant and likewise its employees were engaged in an intrastate service and also made intrastate retail sales. The fact that some of the automobiles and trucks on which repairs were made and accessories installed were known to be destined for other states did not change the character of the service or sale from intrastate to interstate. The fact that in the principal case the Service Company had but one customer instead of many, as in the *Ellinger* case, *supra,* should not result in a different principle ap-

plying in one case than in the other. The employees in both cases were performing identical duties, and likewise the employers were engaged in identical businesses.

See, also, *Jillo Bynum et al. v. Firestone Tire & Rubber Co.*, Tennessee, Court of Appeals, Western Section at Jackson, January 22, 1943, Certiorari denied, Tennessee Supreme Court, May 15, 1943, Petition for writ of certiorari to Court of Appeals of Tennessee denied November 8, 1943, wherein an automobile supply and service store similar to the store involved in the *Ellinger* case, *supra*, was involved with the same decision as in that case. Further, in the *Bynum* case, *supra*, the defendant Service store operated as a separate unit of the defendant Company. However, the Court said that inasmuch as the defendant service store operates as an independent dealer in purchasing its supplies and merchandise from the defendant Company and its competitors, and pays for the same from its own bank account, it constitutes a separate "establishment" for the purpose of determining whether the exemption provided in Section 13(a)(2) for employees of retail or service establishments applies.

In the principal case the F. J. Boutell Service Company is a separate and distinct entity from the F. J. Boutell Drive-Away Company. As in the *Bynum* case, *supra*, the Boutell Service Company purchases its own supplies and merchandise and pays for the same from its own bank account, so, on the basis of the *Bynum* case, *supra*, it likewise is a separate "establishment" for the purpose of determining whether the exemption provided in Section 13(a)(2) for employees of retail or service establishment applies.

In the recent case of *Thomas Martino v. Michigan Window Cleaning Co.*, decided October 18, 1944, by the United States Circuit Court of Appeals for the Sixth Circuit,

writ of certiorari to the United States Supreme Court being denied in 320 U. S. 785, the Court stated in its opinion:

> "Notwithstanding some more or less remote approaches to the present problem in *Kirschbaum v. Walling and Warren-Bradshaw Drilling Co. v. Hall*, it is impossible for us to entertain the concept that window cleaning becomes interstate commerce, or is in pursuance of the production of goods for commerce, by the fact that the windows that are cleaned are in the manufacturing establishments of industries engaged in interstate commerce, nor are we able to reject the concept that a window cleaning company is a service establishment under Section 13(a) of the Fair Labor Standards Act, even though the service it renders is not performed on its own premises. We adhere to our rationalization in *Lonas v. National Linen Service Corp.*, 136 Fed. (2d) 433; 7 Labor Cases 61, 661."

In the *Martino* case the employees in question were employed to wash the windows of a building housing concerns engaged in interstate commerce. As indicated by the quoted portion of the Court's opinion above, the Court was of the opinion that the employees in question were employed in a "retail or service establishment the greater portion of whose selling or servicing was in intrastate commerce," notwithstanding the fact that the building on which the work was being performed housed concerns purely engaged in interstate commerce. As indicated therein, this appears in conflict with the case of *Kirschbaum v. Walling, supra*, on which the appellee below places reliance. Although the type of employment is entirely different in the *Martino* case than in the present case, actually the principle involved is analogous. In the *Martino* case employees of an independent concern were engaged in washing windows of a building owned by a

person other than their employer. In the present case the employees in question were employed by the F. J. Boutell Service Company to repair and service trucking equipment owned and operated by the F. J. Boutell Drive-Away Company, a separate and distinct entity from the F. J. Boutell Service Company. In the *Martino* case the premises on which the employees worked housed concerns engaged in interstate commerce. In the present case the employees worked on trucks engaged in interstate commerce. Notwithstanding the fact that the tenants in the *Martino* case were engaged in interstate commerce, the Court held that the employees of the window cleaning establishment were engaged in a "retail or service establishment." Likewise, we believe this Court, in conformity with the *Martino* case, should hold that the employees of the F. J. Boutell Service Company, involved herein, are engaged in a "retail or service establishment," notwithstanding the fact that the trucks on which the employees worked are engaged in interstate commerce.

In the *Martino* case the Court was of the opinion that the employees in question were engaged in a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce," notwithstanding the fact that the service which was rendered was not performed on its own premises. In the present case this obstacle is not present inasmuch as the service the employees render is always performed on the premises of the F. J. Boutell Service Company.

POINT B

THE COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE QUALIFICATIONS AND MAXIMUM HOURS OF SERVICE OF EMPLOYEES OF THE F. J. BOUTELL SERVICE COMPANY WHO ARE EMPLOYED EXCLUSIVELY TO REPAIR AND MAINTAIN THE MOTOR TRANSPORTATION EQUIPMENT OF A MOTOR CARRIER ENGAGED IN INTERSTATE COMMERCE AND WHO ARE NECESSARILY, BECAUSE OF THE TYPE OF THEIR WORK, ENGAGED IN WORK AFFECTING "SAFETY OF OPERATION OF THE MOTOR VEHICLES," ARE NOT SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION UNDER THE PROVISIONS OF THE MOTOR CARRIER ACT OF 1935

In the case of *Keegan et al. v. Ruppert et al.*, United States District Court, Southern District of N. Y.; Civil No. 13-55, June 8, 1943, the complainants were automobile garage workers who devoted their energies to the maintenance of a large fleet of motor trucks which were leased to Jacob Ruppert by Casale, lessor, for use in the distribution of Ruppert's alcoholic beverage products in both intrastate and interstate commerce. There were a number of diversified problems involved in this case, but as applicable to the principal case the Court stated that the employees of the lessor who serviced, oiled, gassed, washed and repaired the trucks were engaged in interstate commerce as much as the drivers of the trucks, because the interstate business as conducted could not be carried on without their aid. Were it not for them, Ruppert's drivers could not drive the trucks. The Court in the *Keegan* case, *supra,* refused to place its decision on the theory that the lessor was a "service" establishment as such, and therefore exempt from the provisions of the Fair Labor Standards Act as coming within Section 13

(a) (2) of said Act. Instead, the Court placed its decision squarely on the theory that "mechanics who devoted a substantial portion of their time to the repair of trucks engaged in interstate commerce are within the jurisdiction of that Commission (Interstate Commerce Commission), and therefore, those of Casale's employees who devoted a substantial part of their time to the repair of trucks and thus were 'safety' workers are precluded from recovery against Casale," under the provisions of the Fair Labor Standards Act. These employees are rather within the jurisdiction of the Interstate Commerce Commission under the Motor Carriers Act of 1935, so-called. The *Keegan* case, *supra,* and the principal case are directly analogous as to the legal principle involved and also as to the majority of the facts. In both cases the mechanics are employed by a non-carrier to work exclusively on automobile equipment operated by a carrier. The only distinguishing feature in the two cases is that in the *Keegan* case, *supra,* the employer is the owner of the automobile equipment, whereas in the principal case the employer is not in any way connected with the ownership of the automobile equipment upon which its employees render service. This factual distinction had no bearing on the decision in the *Keegan* case, *supra,* and is in reality an immaterial distinction.

Section 13(b)(1) of the Fair Labor Standards Act expressly removes from the benefits of the overtime provisions as set forth in Section 7 of the Fair Labor Standards Act any employee with respect to whom the Interstate Commerce Commission has "power" to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935. One must, therefore, look to Section 204 of the Motor Carrier Act of 1935 and Court decisions thereunder in order to determine the scope of the exemp-

tion as provided in Section 13(b)(1) of the Fair Labor Standards Act of 1938.

The Motor Carrier Act lays little emphasis on the clauses "qualifications and maximum hours of service of employees" or "safety of operation." Neither of these terms are defined in Section 203, 49 U.S.C.A., Sec. 303, the Section of the Act devoted to the explanation and meaning of the words used in the Act. They are part of an enactment passed in an attempt to adjust a new and growing transportation service to the needs of the public. To find their content, they must be viewed in their setting. See *United States v. American Trucking Association*, 84 Law Ed. 1345, 310 U. S. 534. Therefore, under these circumstances, rather than rendering a decision on phraseology alone, the Court should interpret the phraseology of the statute in view of the evil then existing which the Legislature sought to remedy by the enactment, together with judicial interpretations thereof if any should exist.

> "Where to follow the plain meaning of words in a statute will lead, though not to absurdities, to an unreasonable result plainly at variance with the policy of the legislation as a whole, the Court will follow the purpose of the statute rather than its literal words." See *U. S. v. American Trucking Association, supra.*

The Court in *Byers Transportation Company v. United States*, 49 Fed. Supp. 828, District Court, W. D. Missouri, April 3, 1943, expressly stated that "The purpose of the Motor Carrier Act was to promote public safety, dependability and efficiency in the field of interstate motor transportation for hire." While efficient and economical movement in interstate commerce is obviously a major object of the Motor Carrier Act of 1935, there are numerous provisions which make it clear that Congress intended to exercise its powers in the non-transportation phases of

motor carrier activity. See *U. S. v. American Trucking Association, supra; Gibson v. Glasgow*, 157 Southwestern, 2d Ed. 814, Supreme Court Tennessee, January 17, 1942.

As often expressed, one of the purposes or objectives of Section 204 of the Motor Carrier Act of 1935 was to promote public service, and in order to bring about the same, to regulate the activities of employees engaged in safety of operation of interstate motor vehicles. It is elementary that by regulating mechanics, as are here involved, safety of travel is assured—the very object the Legislature had in view in enacting the Motor Carrier Act of 1935. If the Court literally interprets Section 204 of the Motor Carrier Act of 1935, this avowed purpose would be defeated.

In Wage and Hour Division Interpretative Bulletin No. 9, it is stated:

> "It is the opinion of the Wage and Hour Division that many employees of wholesale establishments engaged in the distribution within a State of goods which have been received from other States are engaged in interstate commerce within the meaning of the Fair Labor Standards Act. The Interstate Commerce Commission has jurisdiction under section 204 of the Motor Carrier Act, 1935, over employees of carriers engaged in transportation in interstate or foreign commerce whose duties affect the safety of operation of motor vehicles. The Division deems it necessary for enforcement purposes to consider any employees of wholesale establishments who engage in interstate commerce under the Fair Labor Standards Act and whose duties affect the safety of operation of motor vehicles as exempt from the overtime provisions of the Act under section 13(b)(1). While the question may not be free from doubt since earlier decisions of the Interstate Commerce Commission seemingly have limited the scope of the Motor Carrier Act more narrowly than the courts have construed the Fair Labor Stand-

> ards Act, nevertheless if such employees are engaged in interstate commerce within the meaning of the Fair Labor Standards Act, it is the policy of the Division to regard them as likewise engaged in interstate commerce within the meaning of the Interstate Commerce Act. This position is, of course, taken without prejudice to the rights of the employees under section 16 (b) of the Act."

In determining whether an employee is engaged in commerce or production of goods for commerce, and therefore subject to the Fair Labor Standards Act of 1938, the character of the employees' activities rather than the nature of the employer's business is the deciding factor. See *Overstreet v. North Shore Corporation,* 63 Supreme Court 494, 318 U. S. 125; *Fleming v. Jacksonville Paper Company,* 128 Fed. 2d Ed. 395; *Samuels v. Housten,* 46 Fed. Supp. 364, District Court, S. D. Georgia, Augusta, June 30, 1942; *Gibson v. Glasgow, supra; People v. Horton Motor Lines,* 60 Supreme Court 1059; *Bracey v. Luray,* 49 Fed. Supp. 821, Civil Actions No. 1744, District Court, D. Maryland, March 13, 1943.

Safety of operation of interstate transportation facilities depends on safe mechanical equipment as well as on proper operation by human agencies. The care and repair of motors, lights, brakes, bearings and other appliances and parts of a motor vehicle, in an important manner, affects the safety of operation of said vehicle. See *West v. Smoky Mountain Stages,* 40 Fed. Supp. 296. Certainly the activities of defendants' employees involved herein, whose primary duties are to keep the motor vehicles of an interstate carrier in good and safe working condition, do affect the safety of operation of the said vehicle. To be consistent, the application of Section 13(b)(1) of the Fair Labor Standards Act of 1938 should be governed by the character of the employees' duties rather than the

nature of the employer's business, and therefore the Interstate Commerce Commission should have jurisdiction to establish qualifications and maximum hours of service for the employees herein involved.

It is not the appellants' contention that the Interstate Commerce Commission has jurisdiction to establish qualifications and maximum hours of service for *all* employees of a carrier or service establishment. We do contend, however, that all those employees engaged in activities affecting the "safety of operation" of the Motor Carrier are indiscriminately within the jurisdiction of the Interstate Commerce Commission. This contention is inescapable when the purpose and object of the Legislature in enacting the Motor Carrier Act of 1935 are borne in mind. It should be remembered that the section of the Motor Carrier Act of 1935 here involved was a Committee amendment to the original Act and when *Mr. McManamy, Chairman of the Legislative Committee of the Commission,* explained the provisions of this amendment from the floor of the Senate, he merely said, "It relates to safety."

Further, in *United States v. American Trucking Association, supra,* the Court said:

> "The nature of interstate transportation business makes it necessary that one administrative agency have power to regulate qualifications and maximum hours of service for all business purposes and the Commission is the only Agency charged by Congress with the duty of executing its transportation policy."

Although in the above case the mechanics there involved were employed by a motor carrier, the same reasoning would apply to the mechanics here involved. It would certainly facilitate the transportation policy if the

Interstate Commerce Commission was deemed to have the power to regulate the employees employed to maintain transportation equipment rather than allowing the Interstate Commerce Commission to regulate merely the drivers of the Carrier, and then allowing the mechanics who are as much engaged in safety of operation as the drivers to be regulated by another Administrative Agency. It appears from Section 202(a) of the Motor Carrier Act of 1935 that the Legislature intended one administrative agency to regulate the transportation facilities necessary in order for a motor carrier to engage in interstate commerce. This section provides for the procurment of and the provision of facilities for transportation. Certainly the repair and maintenance of the transportation equipment is one of the necessary facilities in order that a motor carrier may engage in interstate commerce. This intent is further substantiated by Section 203(a)(19) of the Motor Carrier Act of 1935. This Section is limited to the definition of the terms used in said Act. Said Section 19 thereof defines the terms "services" and "transportation." Said terms include not only the actual vehicles operated by, for, or in the interest of a motor carrier, but also the facilities and property operated or controlled by a motor carrier irrespective of the ownership thereof. Certainly a service company is included as one of the facilities essential to the existence of a motor carrier.

After the decision rendered in the case of *Southland Company v. Bayley et al. and Richardson v. James Gibbons Co.*, 319 U. S. 44, there is little doubt as to when the Interstate Commerce Commission has the "power" predicated upon a finding of need, to regulate hours of service of employees engaged in activities affecting safety of operation of Interstate Carriers. Merely because the qualifications with respect to maximum hours and wages of employees have in the past been governed by the Fair

Labor Standards Act of 1938, this does not bar the Interstate Commerce Commission from superseding this regulation if they should determine that the need exists to do so. Therefore, the fact that the Interstate Commerce Commission has not regulated the hours of employment and wages of the employees here involved to date, does not bar them from now doing so.

If the Boutell Service Company is not exempt as a service establishment engaged in intrastate commerce, then the very facts which make it engaged in interstate commerce automatically subject it to the control of the Interstate Commerce Commission because its employees are engaged in work effecting the safety of operations.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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APPENDIX

The provisions of the Motor Carrier Act of 1935 (49 Stat. 543; 54 Stat. 919; 56 Stat. 300; 49 U.S.C.A. secs. 301 *et seq.*) to which reference is made are:

204(a) It shall be the duty of the Commission

(1) To regulate common carriers by motor vehicle as provided in this part and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, *qualifications and maximum hours of service of employees, and safety of operation and equipment.*

202(a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

203(a) (19) The "services" and "transportation" to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.

The provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U.S.C. Title 29, sec. 201 *et seq.*) to which reference is made are:

13(a) The provisions of Section 6 and Section 7 of the Fair Labor Standards Act of 1938 shall not apply with respect to—

(2) Any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.

13(b) The provisions of Section 7 of the Fair Labor Standards Act of 1938 shall not apply with respect to—

(1) Any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935.

Section 7 of the Fair Labor Standards Act of 1938 provides:

"(a) No employer shall * * * employ any of his employees who are engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this Section;

(2) for a workweek longer than forty-two hours during the second year from such date; or

(3) for a workweek longer than forty hours after the expiration of the second year from such date;

unless such employee receives compensation for his employment in excess of the hours above specified at the rate of one and one-half times the regular rate at which he was employed."